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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. AB 1043 (Sub-No. 1)

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MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.—
DISCONTINUANCE OF SERVICE AND ABANDONMENT—
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE

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# COMMENTS OF MONTREAL, MAINE & ATLANTIC RAILWAY, LTD. CONCERNING ACCESS ISSUES



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Dated: August 3, 2010

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## INTRODUCTION

In a decision served on July 20, 2010, the Board requested that interested parties file supplemental briefs regarding several issues relating to "access."[1] More specifically, the Board sought briefing on the question of whether it has the authority to impose, either as a condition of an abandonment order or as a condition of a sale pursuant to the offer of financial assistance ("OFA") procedures, a requirement that Montreal, Maine & Atlantic Railway, Ltd. ("MMA"), the applicant in these abandonment proceedings, grant access by either trackage rights or haulage over lines that would be retained by MMA in order to

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[1] The July 20 decision called for the filing of supplemental briefs on July 27, with reply briefs due on August 3. By a decision dated July 23, 2010, the Board (at the request of the State and MMA) extended the filing dates to August 3 and August 10, respectively.

enable a new operator of the lines to be abandoned and acquired by the State of Maine ("the State") to interchange with rail carriers other than MMA. In addition to briefing on the threshold legal issue—whether the Board has such authority—MMA understands that the Board also desires comment on the terms and conditions any such access might entail.

MMA hereby submits comments on these issues. As set forth in more detail below, MMA believes that the Board lacks any authority, whether pursuant to 49 U.S.C. 10903 or in connection with an OFA, to require any sort of forced access in this case. Furthermore, even assuming *arguendo* that Congress has given the Board general authority to impose forced access as a condition of an abandonment or an OFA, the Board clearly has not been given authority to impose any such access conditions over lines located in Canada. Finally, again assuming *arguendo* that the Board has been given general authority to impose forced access, as a matter of discretion and good transportation policy the Board should not involve itself in the numerous factual and commercial issues that would arise if the parties were unable to reach a negotiated solution.[2]

## ARGUMENT

### I. THE BOARD LACKS AUTHORITY TO IMPOSE ACCESS CONDITIONS IN GENERAL.

As noted above, the Board has requested comment on whether either 49 U.S.C. § 10903 or 49 U.S.C. § 10904 (the statutory provisions governing abandonments and OFAs) would support the imposition of conditions in this case requiring MMA to provide

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[2] In its OFA, the State requests several additional conditions, including a determination that it is entitled to an offset against the line's purchase price for certain claims, with which MMA takes issue. MMA will address such other conditions if and when an appropriate request is made to the Board to set terms and conditions pursuant to the OFA procedures.

some form of access to a subsequent purchaser. In fact, according to Board and ICC precedent, the sort of involuntary access under consideration in this case can only be imposed in a handful of discrete situations, none of which are presented here.

The Board and its predecessor agency have long held fast to the principle that the imposition of forced access (in the form of trackage or haulage rights) is a highly "intrusive" remedy. See, e.g., Phila. Belt Line R.R. Co. v. Consol. Rail Corp., STB Finance Docket No. 32802 (STB served July 2, 1996), 1996 STB LEXIS 336 at *15 n.9 (citing Shenango Inc. v. Pittsburgh, Chartiers & Youghiogheny Ry. Co., 5 I.C.C. 2d 995, 1002 (1989)). For this and other reasons, the Board and the ICC have only imposed forced access in situations specifically provided for by statute. See, e.g., Delaware & Hudson Ry. Co.—Discontinuance of Trackage Rights Exemption—In Susquehanna County, Pennsylvania et al., STB Docket No. AB-156 (Sub-No. 25X) (STB served Mar. 30, 2005), slip op. at 3 (concluding that the Board "has no general power to require a carrier to grant another carrier the right to use its lines" and that the Board's "authority to compel trackage rights arises out of specific provisions of the Interstate Commerce Act"). The merger/consolidation provisions (e.g., 49 U.S.C. § 11324(c)), the terminal facilities provisions (e.g., 49 U.S.C. § 11102(a)), the feeder line acquisition provisions (e.g., 49 U.S.C. § 10907(d)), and the emergency service provisions (e.g., 49 U.S.C. §§ 11123(a) & (c)) specifically empower the Board to impose such access if certain criteria are met. Outside of these specific circumstances, however, the Board and the ICC have consistently concluded that they have no authority to require a rail carrier to allow another carrier access to its lines. Quite simply, where Congress has deemed the imposition of forced access necessary for particular transactions, "it has not hesitated to

provide [the agency] with the express authority to impose [such] conditions." Ry. Labor Executives' Ass'n v. ICC, 791 F.2d 994, 1002 (2d Cir. 1986) (concluding that "[t]he silence of [then] section 10905 regarding the imposition of labor protective conditions, in contrast to the express authority given to the ICC for the imposition of such conditions under other provisions governing rail line acquisitions, is persuasive").

49 U.S.C. § 10904 does not specifically authorize forced access, and thus does not permit the agency to impose access rights as part of an OFA transfer. See, e.g., Chi. & N. W. Transp. Co.—Aban. Exemption—Mason City, Iowa, ICC Docket No. AB-1 (Sub-No. 205X) (Nov. 20, 1987), 1987 ICC LEXIS 48 at *14-15; Ill. Cent. Gulf R.R. Co.—Aban.—Between Tuscaloosa and Maplesville, Alabama, ICC Docket No. AB-43 (Sub-No. 101) (Aug. 7, 1984), 1984 ICC LEXIS 555 at *2-3. As the ICC stated in Chicago & North Western:

> Our examination of 49 U.S.C. 10905 [now 49 U.S.C. 10904] leads us to conclude that we cannot authorize trackage rights as part of a section 10905 transfer. There is no language in 49 U.S.C. 10905 specifically dealing with trackage rights. By contrast, 49 U.S.C. 10910 [now 49 U.S.C. 10907, the feeder line development program statute] allows us, upon the offeror's request, to provide "the acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the acquiring carrier." 49 U.S.C. 10910(d). We must assume that if Congress wanted us to impose trackage rights in financial assistance proceedings it would have provided us with specific language like that found in 49 U.S.C. 10910.

1987 ICC LEXIS 48 at *14-15 (quoting Conrail Aban. of the Cairo Branch in Illinois, ICC Docket No. AB-167 (Sub-No. 56N) (ICC served Mar. 4, 1983) (not printed)). See also Consol. Rail Corp.—Aban. Exemption—In Erie County, New York, STB Docket

No. AB-167 (Sub-No. 1164X) (STB served Oct. 7, 1998), slip op. at 10 ("Ordinarily, we have no jurisdiction to compel a rail carrier to...grant trackage rights to another carrier."); Request for an Order Directing the S. Pac. Transp. Co. to Negotiate Trackage Rights with the Great W. Ry., ICC Finance Docket No. 30872 (Oct. 15, 1986), 1986 ICC LEXIS 110 at *4 ("Generally, we have no power to compel a railroad to grant trackage rights over its lines to another carrier.").

Likewise, 49 U.S.C. § 10903 does not specifically authorize the Board to impose forced access, and the agency therefore lacks jurisdiction to condition an abandonment on the granting of such access. See, e.g., Union Pac. R.R. Co.—Aban.—In Harris, Fort Bend, Austin, Wharton and Colorado Counties, Texas, STB Docket No. AB-33 (Sub-No. 156) (STB served Nov. 8, 2000), 2000 STB LEXIS 654 at *4 (concluding that abandonment proceedings are "not the appropriate forum in which to grant...trackage rights"); Consol. Rail Corp.—Aban. Exemption—In Erie County, New York, STB Docket No. AB-167 (Sub-No. 1164X) (STB served Oct. 7, 1998). As the Board stated in Consolidated Rail:

> Ordinarily, we have no jurisdiction to compel a rail carrier to...grant trackage rights to another carrier. Toledo, P. & W. R. Co., Control, 295 I.C.C. 523, 541 (1957). While we can impose trackage rights as a condition to a rail consolidation under 49 U.S.C. 11323 or in a terminal area under 49 U.S.C. 11103, these circumstances are not present here. We [therefore] find that we lack jurisdiction to grant...trackage rights relief here.

STB Docket No. AB-167 (Sub-No. 1164X), slip op. at 10.

Based on the unambiguous silence in 49 U.S.C. §§ 10903 and 10904 on the issue of forced access, it is readily apparent that Congress has not authorized the Board to

impose trackage or haulage rights[3] as a condition of an abandonment or as part of an OFA transfer. To do so here would, quite simply, exceed the Board's statutory mandate.[4]

The primary (if not the exclusive) basis cited by abandonment opponents as support for the Board's authority to impose forced access is Vice Chairman Mulvey's separate comment in Wis. Cent. Ltd.—Aban.—In Ozaukee, Sheboygan and Manitowoc Counties, Wisconsin, STB Docket No. AB-303 (Sub-No. 27) (STB served Oct. 18, 2004), slip op. at 25. Upon closer examination, however, even this comment does not support the sort of forced access proposed here. Indeed, in his separate comment Vice Chairman Mulvey suggested only that the carrier should be required to "enter into negotiations with any successor operator," necessarily implying that such negotiations may or may not result in a final agreement that may or may not include some form of access. Id. Furthermore, even this negotiation requirement would have depended upon a demonstration by the successor operator that "such rights are necessary for its operations to be feasible." Id. Vice Chairman Mulvey's comment in Wisconsin Central is,

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[3] While the cited precedents focus primarily on the issue of trackage rights, the imposition of haulage rights is best viewed as a lesser included remedy and thus likewise would be inappropriate here. In fact, the Board has generally disclaimed jurisdiction over haulage arrangements. See, e.g., Waterloo Ry. Co.—Adverse Aban.—Lines of Bangor & Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2) (STB served May 6, 2003), 2003 WL 21009327 at *1 ("Haulage agreements are not subject to our jurisdiction.").

[4] It is not surprising that the Board lacks authority to grant the type of forced access requested by the State, given that doing so would render certain statutory provisions superfluous. Any short line that might operate on the line to be acquired by the State could rely on the provisions of 49 U.S.C. §§ 10701-10705 for assurance that it could enjoy joint routes and rates, on reasonable terms and conditions, for traffic moving between the short line and MMA. In fact, such routes, rates, and divisions may be prescribed by the Board in certain circumstances. MMA has always been and continues to be ready, willing, and able to work cooperatively with any short line to interchange traffic pursuant to through routes and joint rates.

therefore, simply a suggestion that negotiations might be required if a successor operator could meet a particular evidentiary prerequisite; it is not a suggestion, much less a mandate, regarding forced access at all. Furthermore, as demonstrated in Section III below, even if the Board had the authority to impose forced access as a general matter, such a determination would involve a detailed factual and commercial analysis—and one that the Board should avoid as a matter of discretion and sound transportation policy.

## II. THE BOARD LACKS JURISDICTION TO IMPOSE ACCESS CONDITIONS IN CANADA.

The State has requested trackage rights for its operator between Madawaska, at the northern end of the line to be abandoned, and the interchange between MMA and Canadian National Railway ("Canadian National") at St. Leonard, New Brunswick, a distance of approximately 25 miles. The MMA line in question crosses the international border and extends several thousand feet into Canada. The termination of the MMA line and the physical connection and interchange with Canadian National are located entirely within Canada.

The Board has previously considered trackage rights relating to this line. In 2001, Bangor & Aroostook Railroad ("BAR") and its affiliate, Van Buren Bridge Co. ("Van Buren"), MMA's predecessors in interest, granted trackage rights to Canadian National between Madawaska and the connection with Canadian National in St. Leonard, New Brunswick. At that time, BAR owned the line between Madawaska and the international bridge over the St. John River, while Van Buren owned the bridge and the line extending for a short distance into Canada (up to the connection with Canadian National).

In its notice of exemption served on March 21, 2001, the Board noted that Canadian National would "acquire trackage rights over a short distance of [Van Buren's]

line in Canada to reach a connection with an existing [Canadian National] line in St. Leonard, New Brunswick, Canada," but that this acquisition of trackage rights in Canada was "not subject to the Board's jurisdiction." Canadian Nat'l Ry. Co.—Trackage Rights Exemption—Bangor & Aroostook R.R. Co. and Van Buren Bridge Co., STB Finance Docket No. 34014 (STB served Mar. 21, 2001), slip op. at 1 n.1. In a simultaneous related transaction, BAR and Van Buren granted a freight easement to an affiliate of Canadian National, Waterloo Railway Co., between Madawaska and the connection with Canadian National in New Brunswick. As in the case of the trackage rights notice of exemption, the Board stated that the Canadian portion of the transaction was not subject to its jurisdiction. Waterloo Ry. Co.—Acquisition Exemption—Bangor & Aroostook R.R. Co. and Van Buren Bridge Co., STB Finance Docket No. 34015 (STB served Mar. 21, 2001), slip op. at 2 n.3.

This recognition by the Board of its lack of jurisdiction over transactions involving lines in Canada is entirely consistent with the language of the Board's jurisdictional statute and numerous other agency and court decisions regarding the Board's lack of general extraterritorial jurisdiction. See, e.g., 49 U.S.C. 10501(a)(2)(F) ("Jurisdiction...applies only to transportation in the United States between a place in the United States and a place in a foreign country." (emphasis added)); Great N. Pac. & Burlington Lines, Inc.—Merger—Great N. Ry. (In re: Blaricom), 6 I.C.C.2d 919, 925 (1990) ("Given the overall judicial (and presumably Congressional) intent not to interfere with the laws of other countries, and the judicial precedent that a clear statement of extraterritorial intent be present, we are not persuaded on this record that employees of American railroads in other countries are covered by § 11347 [now § 11326] of the

statute."); United States v. Pa. R.R. Co., 323 U.S. 612, 621 (1945) (concluding that "whatever power Congress might have to regulate the conduct of...domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the [ICC] with general authority to regulate rail transportation in foreign countries" (footnote omitted)).

Indeed, the Board's lack of jurisdiction over rail lines and transportation in Canada was tacitly recognized by the shippers opposing the present abandonment. In their "Motion to Reject or Dismiss Application" (dated March 12, 2010), Irving Woodlands LLC; Irving Forest Products, Inc.; Fraser Papers, Inc.; Portage Wood Products, LLC; Seven Islands Land Co.; Red Shield Acquisition LLC; Louisiana-Pacific Corp.; and Huber Engineered Woods, LLC argued that the abandonment would create a "stranded segment" between Madawaska and Van Buren that would connect only to the Canadian rail network. Motion at 2-4. This, in turn, supposedly would force customers to "depend upon the laws and regulations of a foreign country in order to access the U.S. interstate rail network" and create a variety of problems both for customers and the Board in "evaluating whether the Canadian rail regulatory structure would sufficiently protect the interests of the businesses and communities" on the so-called stranded segment. Id. at 6 & 7. Thus, these parties have conceded that the Board lacks jurisdiction over access rights in Canada.[5]

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[5] MMA disagrees with the contention that approval of the abandonment would create a stranded segment. For further discussion of this issue, see Reply of Montreal, Maine & Atlantic Ry., Ltd. in Opposition to "Motion to Reject or Dismiss Application" (filed Mar. 15, 2010) at 2-4; Rebuttal Argument of Montreal, Maine & Atlantic Ry., Ltd. (filed May 25, 2010) at 28-29.

## III. AS A MATTER OF POLICY AND DISCRETION, THE BOARD SHOULD NOT ESTABLISH ACCESS CONDITIONS.

As demonstrated above, the Board does not have the authority in abandonment or OFA cases to impose forced access over lines that an abandoning rail carrier will retain. Even if the Board had such authority, however, there are compelling reasons why the Board should refrain from involving itself in the establishment of terms and conditions regarding access. By involving itself in this process, the Board would be called upon to resolve significant factual disputes that are best resolved through voluntary negotiations between the parties.[6] Thus, even assuming *arguendo* that it has the statutory authority to impose access conditions, the Board should refrain from doing so as a matter of sound transportation policy and discretion.

As an initial matter, the Board would be called upon to decide whether access should be by means of trackage or haulage rights. MMA has demonstrated in its abandonment application that the traffic volumes on the lines to be abandoned are too low to support the operations of one carrier, much less two. If the Board were to impose trackage rights, all of the potential economies of scale that could be achieved through operation of a single train would be lost. This would make no sense for either MMA or a short line operator of the lines to be acquired by the State. Thus, the imposition of trackage rights would not promote—indeed, it would undermine—the goal of

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[6] As the Board is aware, MMA and the State have engaged in protracted negotiations in an effort to reach an agreement pursuant to which MMA would sell the lines to the State to allow for continued rail operations. In the course of these negotiations, MMA has made extraordinary efforts to accommodate the State's position regarding access. As noted above in Section I, the interchange of traffic between MMA and a short line carrier normally would be accomplished by means of joint through rates and divisions (which would be fully guaranteed by statute), but MMA has suggested a variety of approaches to address the State's demand for trackage rights. MMA remains hopeful that the parties may yet reach agreement on these issues.

strengthening rail service in Maine for the benefit of rail customers and the area's economy in general.

The premise of the forced access request in this proceeding is that a short line would be unable to operate profitably without the access provided by trackage rights. To test this premise, the Board would be called upon to review and analyze pro forma income statements projecting the operations of a short line, both with and without trackage rights. Because the State has not selected an operator, the State itself presumably would be required to produce such income statements. Any review of pro forma statements of a hypothetical short line operator also would be necessarily accompanied by an analysis of the economic impact such trackage rights would have on MMA's business and finances, as the Board would need to determine whether the imposition of trackage rights would have an adverse impact on MMA's ability to provide service on the rest of its system.[7]

As the State has suggested that the trackage rights should be made available at reasonable commercial rates, the Board would also be called upon to determine what rate would be appropriate under the circumstances. Such a determination would involve a review of evidence and argument concerning the appropriate method for establishing rates for trackage rights and the various factors, such as the capital costs to maintain the trackage in question, that would bear upon the establishment of an appropriate rate. The

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[7] Moreover, any analysis of trackage rights in this case must take into account the very low traffic density on the lines to be abandoned. This low density means that unit costs are abnormally high when compared to situations on lines with normal traffic densities. In negotiating through rates and divisions (or trackage rights fees) in these kinds of situations, the parties would normally take into account market competitive conditions that could result in pricing that is higher than variable cost but lower than fully distributed cost. Thus, it is the parties themselves that are most capable of arriving at commercial decisions that make economic sense under any given set of circumstances.

Board would need to consider whether trackage rights rates voluntarily set by other carriers in other circumstances would provide an appropriate basis for comparison, or whether there are unique factors here that would dictate different rates.

In this case, for example, the State is proposing trackage rights that may require the construction of new interchange tracks and facilities that would enable the short line to interchange with Canadian National in St. Leonard, New Brunswick; with Eastern Maine Railway/New Brunswick Southern Railway at Brownville Junction, Maine; and with Pan Am Railways at Northern Maine Junction (near Bangor). While the State has suggested that it or its operator would be responsible for any such construction costs, the Board might be called upon to determine precisely what type of interchange facilities should be constructed at each location.

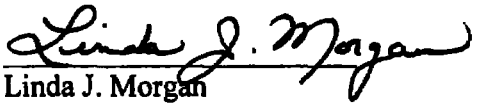
As described above, the Board would be required to render a number of decisions involving potentially detailed factual analyses and conflicting expert views were it to involve itself in the question of forced access. The issues that the Board would be called upon to consider are issues that rail carriers negotiate on a regular basis, taking into account a variety of commercial factors. MMA respectfully submits that as a matter of discretion and good transportation policy, the Board should not insert itself into commercial relationships that are more properly left to the judgment of the parties involved (again, assuming *arguendo* that the Board even has the authority to do so).

## CONCLUSION

The Board lacks the authority to impose access conditions as part of an abandonment decision or in connection with an OFA transaction in general, and lacks the authority to impose such conditions over lines in Canada in particular. MMA therefore

believes that access over any of MMA's lines should be resolved by voluntary discussions between the parties.[8]

Respectfully submitted,



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Dated: August 3, 2010

[8] MMA is not submitting any evidence or testimony at this time regarding the commercial need for access or the terms and conditions of any such access, but respectfully reserves the right to do so if appropriate in its reply to comments filed by the State or other parties. The burden of proof on these issues is on the State or others requesting mandatory access conditions. See, e.g., 49 C.F.R. § 1152.27(h)(3) ("The [OFA] offeror has the burden of proof as to all issues in dispute.").

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Comments of Montreal, Maine & Atlantic Railway, Ltd. Concerning Access Issues this 3rd day of August, 2010 by causing copies to be sent to the parties of record in these proceedings either by overnight delivery service or by United States mail, postage prepaid.

Charles H.P. Vance